IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CELINA M. MESA,

Plaintiff,

v.

RICHARD W. TOBIN, MARK E. FOGELSONG, HAROLD S. BOYD, dba ORTHOPAEDIC ASSOCIATES, and HARRY MARTIN,

Defendants.

Civil No. 06-6198-TC

ORDER

COFFIN, Magistrate Judge:

Plaintiff brings this action for quid pro quo and hostile work environment sexual harassment. She also brings claims for violations of the Federal Family Medical Leave Act, the Oregon Family Leave Act and other state claims.

Presently before the court are defendants' motions (#14, #25 and #41) to dismiss.

STANDARDS

Pursuant to Fed. R. Civ P. 12 (b), a complaint may be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Tanner v. Heise, 879 F.2d 572, 576 (9th Cir. 1989) [quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)].

In making this determination, this court accepts all allegations of material fact as true and construes the allegations in the light most favorable to the nonmoving party. Id.

DISCUSSION

Quid Pro Quo Sexual Harassment

Defendants move to dismiss the quid pro quo sexual harassment claim as plaintiff alleges the harassment came from a coworker instead of a supervisor. Plaintiff contends the claim is valid as plaintiff's supervisors knew of the harassment, ratified it and made it a condition of her employment by forcing her to choose between the coworker's harassment or leaving her job. Although plaintiff's argument is appealing, it is generally descriptive of hostile environment discrimination and possibly retaliatory sex discrimination.[1] It does not meet the general requirements for a quid pro quo claim. "Quid pro quo harassment is generally understood to be a supervisor seeking or insisting on sexual favors from an employee in order to maintain his or her job or to obtain advancement." Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1073 N. 1 (9th Cir. 2002)(emphasis added). The essence of the quid pro quo theory of sexual harassment is that "a supervisor relies on his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo." Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (emphasis added); Nichols v. Frank, 42 F3d 503, 508 (9th Cir. 1994).

Plaintiff has not provided, and this court has not found, a quid pro quo case where the harasser was merely a coworker and not a supervisor. Coworker harassment is generally associated with hostile environment claims and not quid pro quo claims. For example, an Oklahoma District Court stated: "[u]nlike quid pro quo case, a hostile work environment claim may arise from harassing

[1]Plaintiff has asserted both of these type of claims in her pleadings.

conduct of coemployees." Marshall v. Nelson Electric Co., 766 F. Supp. 1018, 1040 (N.D. OK 1991). At oral argument plaintiff cited to Porter v. California Dept . of Corrections, 383 F.3d 1018 (9th Cir. 2004). However, this opinion has been amended and superceded by Porter v. California Dept. of Corrections, 419 F3d 885 (9th Cir. 2005) . There the Ninth Circuit Court of Appeals stated:

> Porter's briefing does not specify whether she is alleging quid pro quo or hostile work environment sexual harassment. Since the facts are sufficient to establish a prima facie case of hostile work environment harassment, however, we leave for another day the question of whether quid pro quo liability attaches when an alleged harasser , who was not in a position to exact reprisals at the time his advances were rejected, is subsequently entrusted with and abuses such authority.

419 F3d at 892. Such does not change the above analysis. Plaintiff's alleged harasser was not plaintiff's supervisor and did not become plaintiff's supervisor.

Plaintiff's quid pro quo claims are dismissed.

Oregon Family Leave Act Claim

Plaintiff alleges that defendants retaliated against plaintiff for requesting and taking medical leave and that such violates the Oregon Family Leave Act (OFLA). Defendant contends that under the OFLA statutes , OFLA unlawful employment practices are limited to denials of requested OFLA leave, and that there is not an action for retaliatory discharge under OFLA.

For its position that a claim for retaliatory discharge exists, plaintiff cites an Oregon Court of Appeals decision, Yeager v. Providence Health System Oregon, 195 Or. App. 134, rev. denied, 237 Or. 658 (2004). However, because Yeager is a decision of the Oregon Court of Appeals and not the Oregon Supreme Court, this court is not required to follow it in interpreting questions of state law. See Vester v. Dev. II, LLC v. General Dynamics Corp., 248 F.3d 958, 960 (9th Cir. 2001). Several

judges of this Oregon Federal District have repeatedly looked at the precise issue presented in this matter and held that there is not a claim for retaliation under the OFLA. See, e.g., Stewart v.Sears, Roebuck and Co.,No. CV 04-428-HU, Supplemental Findings & Recommendation issued April 5, 2005(Hubel J.), adopted June 29, 2005 (Mossman J.); Cameron v. T-Mobile USA, Inc., No. CV 04-272 -KI, Opinion and Order issued April 28, 2005 (King J.); Ryman v. Sears, Roebuck and Co., No. CV 05-1106- BR, Opinion and Order issued June 19, 2006 (Brown J.).

In Stewart(attached hereto), the court analyzed Yeager and declined to follow it as it did not go far enough in its analysis and there was no evidence showing that the argument on which the Stewart decision was based was raised in Yeager. As set forth in more detail in the attached opinion. Stewart held that Oregon statutes only authorized a claim for the denial of leave and not a retaliation claim. Stewart noted how Yeager read the OFLA statute together with an administrative rule to conclude that the OFLA provides a remedy for retaliation, but in fact that the administrative rule improperly expands the scope of protection given by the statute and that the purported creation of a retaliation cause of action by the administrative rule under OFLA is beyond the authority delegated to the Oregon Bureau of Labor and Industries by the Legislature.

Similar to the Stewart court , this court is sympathetic to plaintiff's argument, but given the statutory framework, there is only supposition that the Legislature intended to create a retaliation cause of action under OFLA. Supposition is not a proper basis upon which to rewrite the plain language of the statutes. Plaintiff's OFLA claim is dismissed, but plaintiff's request to replead the claim is allowed if done so within 30 days.

CONCLUSION

Defendants' motions (#14, #25 and #41) to dismiss are allowed and plaintiff's quid pro quo claims and Oregon Family Leave Act claim are dismissed. Plaintiff's request to replead the OFLA claim is allowed if done within 30 days.

DATED this 26th day of January, 2007.

THOMAS M. COFFIN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SARAH STEWART (f.k.a. Sarah Hills), Plaintiff, v. SEARS, ROEBUCK AND CO., a a foreign corporation, Defendant.	No. CV-04-428-HU SUPPLEMENTAL FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff Sarah Stewart, formerly known as Sarah Hills, brings this employment action against defendant Sears, Roebuck & Company, her former employer. Plaintiff contends that defendant violated

her rights under the federal Family Medical Leave Act (FMLA) and Oregon's Family Leave Act (OFLA). She also brings a state common-law wrongful discharge claim and a claim under Oregon Revised Statute § (O.R.S.) 652.150 for the alleged failure to timely pay her wages at the time of her discharge.

Defendant moves for summary judgment on both Leave Act claims and the wrongful discharge claim. In a March 7, 2005 Findings & Recommendation, I recommended denial of defendant's motion except as to plaintiff's OFLA claim. I deferred ruling on that claim pending further briefing and oral argument. Having considered the additional submissions and the parties' oral arguments, I recommend that defendant's motion regarding the OFLA claim be granted.

STANDARDS

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"If the moving party meets its initial burden of showing 'the absence of a material and triable issue of fact,' 'the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.'" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th

Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. Id.; In re Agricultural Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

DISCUSSION

As noted in the March 7, 2005 Findings & Recommendation, the issue is whether plaintiff can maintain a retaliation cause of action under OFLA. In a 2002 decision, I determined that OFLA did not allow for a retaliation claim. Denny v. Union Pac. R.R., No. CV-00-1301-HU, Findings & Rec. at pp. 7-9 (D. Or. Oct. 31, 2002), adopted by Judge Jones, January 20, 2003. I concluded that an Oregon Administrative Rule (OAR) adopted by the Oregon Bureau of Labor and Industries (BOLI) unlawfully expanded the scope of the rights afforded by the statute. Id.

In the instant case, plaintiff argues that rather than adhere to the reasoning in Denny, which a number of Judges in this District have followed[1], I should adopt the reasoning and holding of a recent Oregon Court of Appeals decision, Yeager v. Providence Health System Oregon, 195 Or. App. 134, 96 P.3d 862, rev. denied, 237 Or. 658, 103 P.3d 641 (2004), which recognized the existence of an OFLA retaliation claim.[2] I reject plaintiff's argument.

The Yeager court's analysis begins by noting that under Oregon Revised Statute § (O.R.S.) 659A.885(1), "[a]ny individual claiming to be aggrieved by an unlawful practice specified in subsection (2) of this section may file a civil action in circuit court." Id. at 138, 96 P.2d at 864. Yeager also noted that O.R.S. 659A.885(2), in turn, provides that "[a]n action may be brought under subsection

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[1] Ladendorff v. Intel Corp., No. CV-02-6259-AS, Opinion & Order at pp. 14-20 (D. Or. Mar. 19, 2004) (Judge Ashmanskas); Louemna v. Les Schwab Tire Ctrs of Portland, Inc., No. CV-02-856-KI, 2003 WL 23957142, at *6 (D. Or. Oct. 2, 2003) (Judge King) Head v. Glacier Northwest, Inc., No. CV-02-373-MA, Opinion & Order at p. 3 (D. Or. Apr. 30, 2003) (Judge Marsh).

[2] Because Yeager is a decision of the Oregon Court of Appeals and not the Oregon Supreme Court, I am not required to follow it in interpreting questions of state law. See Vestar Dev. II, LLC v. General Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001) ("When interpreting state law, federal courts are bound by the decisions of the state's highest court"). In the absence of binding Oregon Supreme Court precedent, the role of this Court is to predict how that Court will rule. Id. While intermediate appellate decisions can useful for that purpose, I am not obligated to follow those decisions if there is evidence that the Oregon Supreme Court might decide the issue differently. Here, I cannot rely on the Yeager decision as a predictor of how the Oregon Supreme Court would rule on this issue when there is no evidence showing that the argument on which I base my decision was raised in Yeager. I conclude that if the Oregon Supreme court were presented with the precise issue, it would not follow Yeager.

(1) of this section for the following unlawful practices[,]" then listing a number of specific statutes in O.R.S. Chapter 659A, including O.R.S. 659A.150 to O.R.S. 659A.186, the statutes comprising OFLA. Id.

Under the OFLA statutes, OFLA unlawful employment practices are limited to denials of requested OFLA leave. O.R.S. 659A.183. Thus, the defendant in Yeager, like the defendant in Denny, and the defendant in the present case, argued that the Oregon Legislature did not provide a civil action for retaliatory discharge under OFLA.

Yeager noted that O.R.S. 659A.001(12) "defines 'unlawful practice' for purposes of OFLA to include 'a practice that violates a rule adopted by the commissioner for the enforcement of the provisions of this chapter.'" Id. at 138, 96 P.3d at 865 (emphasis added in Yeager). BOLI's relevant administrative rule provides that

> [i]t is an unlawful employment practice for an employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act.

OAR 839-009-0320(3).

Yeager relied on the definition of "unlawful practice" in O.R.S. 659A.001(12) and OAR 839-009-0320(3) to conclude that

> the relevant statutes and administrative rule make it clear that the legislature intended to provide a civil action for an unlawful practice under OFLA. An unlawful practice is defined to include a violation of a rule adopted by BOLI. Here, BOLI has adopted a rule that makes it an unlawful employment practice to retaliate against an employee for inquiring about OFLA leave, submitting a request for OFLA leave, or in any way invoking the provisions of OFLA. In combination, the

> relevant statues and administrative rule create a civil remedy for retaliatory discharge under OFLA.

Yeager, 195 Or. App. at 139, 96 P.3d at 865.

Plaintiff also notes that both Judge King and Judge Mosman of this District have followed Yeager to allow an OFLA retaliation claim. Viken v. North Pac. Group, Inc., No. CV-03-932-MO, Transcript of Oral Arg. on Cross-Motions for Sum. Jdgmt pp. 9, 45-46 (Docket #118) (D. Or. Oct. 26, 2004); Spees v. Willamina Sch. Dist. 30J, No. CV-03-1425-KI, Opinion at p. 15 (D. Or. Oct. 19, 2004).

While Yeager's citation to O.R.S. 659A.001(12) is relevant, I conclude that the Yeager court's analysis does not go far enough and thus, its holding is not supportable. It does not appear from the discussion in Yeager that the parties urged the court to focus on the precise listing of statutes in O.R.S. 659A.885(2) and the omission from that list of either O.R.S. 659A.001(12) or O.R.S. 659A.805(1)(e) which gives BOLI authority to adopt rules "[c]overing any . . . matter required to carry out the purposes of this chapter." As a result of the likely failure of the parties to raise this issue with the Yeager court, the court failed to address the fact that while O.R.S. 659A.001(12) includes certain practices established under BOLI rules as "unlawful practices," O.R.S. 659A.885(1) and (2) do not include an unlawful practice as defined by BOLI regulation as one giving rise to a civil cause of action. Neither O.R.S. 659A.001(12) nor O.R.S. 659A.805(1)(e) were listed by the Legislature in O.R.S. 659A.885(2). Similarly, these issues and arguments do not appear to have been raised before Judge King or Judge Mosman in their respective cases.

As in Yeager, the starting point is O.R.S. 659A.885(1). There, the Oregon Legislature creates a civil cause of action for individuals aggrieved by the unlawful practices specifically listed in O.R.S. 659A.885(2). In O.R.S. 659A.885(2), the Legislature enumerated several specific Oregon statutes for which an action may be brought under O.R.S. 659A.885(1). Notably, the Legislature did not state in O.R.S. 659A.885(1) and (2) that a civil action may be brought for all "unlawful practices" found in O.R.S. Chapter 659 or all "unlawful practices" as defined by statute or BOLI regulation, something the Legislature could easily have done.

Rather, the Legislature chose to specifically delineate, by referring to precise O.R.S. sections, which statutory unlawful practices give rise to a civil action. O.R.S. 659A.001(12), defining unlawful practice to include the violation of a BOLI rule, and O.R.S. 659A.805(1)(e), giving BOLI the authority to adopt rules covering any other matter required to carry out the purpose of O.R.S. Chapter 659, are not in the enumerated list in O.R.S. 659A.885(2).

As a result, I can reach no conclusion other than that the Legislature did not create a civil cause of action under O.R.S. 659A.885(1) and (2) for violations of unlawful practices that are defined only by a BOLI rule and not by one of the statutes listed in O.R.S. 659A.885(2). Since a retaliation cause of action is not made an unlawful practice in the OFLA statutes themselves, which are referenced in O.R.S. 659A.885(2), such a cause of action is not maintainable under O.R.S. 659A.885(1) and (2).

Without the Legislature having listed O.R.S. 659A.001(12) or O.R.S. 659A.805(1)(e) in O.R.S. 659A.885(2), BOLI's regulation that

purports to create a retaliation cause of action under OFLA, OAR 839-009-0320(3), is beyond the authority delegated to BOLI by the Legislature. That is, by not listing those statutes in O.R.S. 659A.885(2), the Legislature did not give BOLI the delegated power to establish a new civil cause of action.

It is important to note that while I am sympathetic to plaintiff's position, given the statutory framework, I have only supposition that the Legislature intended to create a retaliation cause of action under OFLA. Supposition is not a proper basis upon which to rewrite the plain language of the statutes. It is not this Court's role to substitute its judgment for that of the Legislature.

For the reasons initially expressed in Denny, and for the reasons explained in this Supplemental Findings & Recommendation, I conclude that Oregon does not provide a retaliation claim for requesting OFLA leave.

CONCLUSION

I recommend that defendant's motion for summary judgment (#22) as to the OFLA claim, be granted.

SCHEDULING ORDER

The above Supplemental Findings and Recommendation will be referred to a United States District Judge for review together with the March 7, 2005 Findings & Recommendation on the OFLA claim. Objections, if any, are due May 2, 2005. If no objections are filed, review of the March 7, 2005 Findings and Recommendation and this Supplemental Findings & Recommendation will go under advisement on that date.

If objections are filed, a response to the objections is due

May 16, 2005, and the review of the March 7, 2005 Findings and Recommendation and the Supplemental Findings & Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 15th day of April, 2005.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge